BOOK NOTE

POSSESSING THE PACIFIC: LAND, SETTLERS, AND INDIGENOUS PEOPLE FROM AUSTRALIA TO ALASKA, by Stuart Banner.* Cambridge, Massachusetts: Harvard University Press. 2007.

Most people leave school with a simple understanding of the relationship between British and American colonists, Native Americans and Pacific Islanders, and the lands of the "New World": the colonists wanted it, the natives had it, and the colonists used whatever means available to take it. In his new book, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska*, Professor Stuart Banner dives into this familiar history and shows his readers that while these traditional assumptions do have merit, the story of the Pacific is not as simple as it may first seem.[1]

Possessing the Pacific is not Professor Banner's first foray into the field of native and colonial land use systems. In *Legal Systems in Conflict: Property and Sovereignty in Missouri, 1750-1860*, Professor Banner detailed the transition from older, informal legal traditions to English common law in "Upper Louisiana" following the Louisiana Purchase in 1803.[2] Later, in *How the Indians Lost Their Land: Law and Power on the Frontier*, Banner outlined the shifts in legal and economic regimes from the advent of American colonization to the middle of the Great Depression and explained how the gradual erosion of respect for Native title propagated the relentless western advances of American colonists and the removal of Native Americans from their land.[3] Now, in *Possessing the Pacific*, Professor Banner casts a wider geographical net and undertakes a comparative study of how English and American colonists purchased, finagled and outright stole land from Native people across the Pacific. Banner directs his readers to look past the common (but not universal) theme of native dispossession and to recognize the surprising variations in the treatment of indigenous claims to land ownership. These variations, Banner postulates, stem from idiosyncratic decisions by local officials rather than deliberate strategizing by Anglo-American colonial officials. These decisions, Banner notes, were "all the more remarkable" given the overlapping time frames of the various colonization efforts and the unifying backdrop of Anglo-American culture and common law.[4] Banner argues, in closing, that these early differences in legal conceptions of indigenous title have had a great impact on claims of redress brought in the past few decades and continue to impact the lives of

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[1] STUART BANNER, POSSESSING THE PACIFIC: LAND, SETTLERS, AND INDIGENOUS PEOPLE FROM AUSTRALIA TO ALASKA (2007).

[2] Jonathan M. Atkins, Book Review, 20 J. EARLY REPUBLIC 742 (2000) (reviewing STUART BANNER, LEGAL SYSTEMS IN CONFLICT: PROPERTY AND SOVEREIGNTY IN MISSOURI, 1750-1860 (2000)).

[3] Richard A. Hawkins, Book Review, 41 J. AM. STUD. 471 (2007) (reviewing STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2005)).

[4] BANNER, *supra* note 1, at 3 (citing A SOURCE BOOK OF AUSTRALIAN LEGAL HISTORY 253-254 (J.M. Bennett & Alex C. Castles eds., Law Book Company 1971).

both indigenous peoples and those that possess and inhabit much of their ancestral lands today.

I. *TERRA NULLIUS*

Banner divides his book into nine sections that roughly mirror the eight regions he discusses: Australia, New Zealand, Hawaii, California, British Columbia, Oregon and Washington, Fiji and Tonga, and Alaska. Banner opens in Australia, where he contrasts the British approach to native title in that colony, "*terra nullius* by design," with the more typical British practice of recognizing full native title and obtaining land only through purchase. When James Cook set sail for the South Pacific in 1768, he went with instructions to take possession only "with the consent of the natives" or if he found the country "uninhabited."[5] Under the legal doctrine of *terra nullius*, land that was empty or owned by no one was freely available for appropriation by the British Crown, which would then grant or sell land to settlers.[6] As history revealed, the British conception of "uninhabited" was figurative, not literal. Early explorers found Australia to be "thinly inhabited"[7] with small and dispersed groups of natives, and they expressed a distressing distaste for the natives they did encounter.

The British conception of "inhabited" land also clashed with the Aboriginal practice of hunting and gathering rather than farming. The British legal tradition had long associated "civilization" – and property rights – with the "cultivation" of the land. Less than a hundred years before the British arrived in Australia, John Locke had written that "whatsoever then [a person] removes out of the state that nature has provided. . . he has mixed his labor with, and joined it to something that is his own, and thereby makes it his property."[8] These early explorers may have had more than the writings of John Locke on their mind as they declared Australia *terra nullius*, however. As Banner notes, the "well-armed government expeditions" that accompanied these adventures reduced the likelihood of military reprisal by the Aborigines and surely boosted the explorers' confidence as they staked their claims for the Crown.[9]

Once the colony had established *terra nullius*, the settled expectations of British farmers cemented its (legal) legitimacy despite persistent opposition to *terra nullius* by missionaries, certain lawyers and journalists, and even members of the Colonial Office and Parliament. Consistent with the

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[5] *Id.*

[6] *See* BANNER, *supra* note 1, at 2, 14. In practice, settlers would often simply appropriate *terra nullius* land for their own use; the Crown would ratify these personal land holdings at a later date.

[7] *Id.* at 16 (citing 2 THE ENDEAVOR JOURNAL OF JOSEPH BANKS, 1768-1771, at 122-123 (J. C. Beaglehole ed., Angus and Robertson 1962)).

[8] JOHN LOCKE, TWO TREATISES OF GOVERNMENT, at Ch. V § 27 (1689).

[9] BANNER, *supra* note 1, at 47.

legal regime of *terra nullius*, later colonial governments both refused to purchase lands from Australian Aborigines themselves and invalidated purchases of Native land by private speculators.[10] Through this example, Banner illustrates how the initial decisions of a small number of individuals could entrench a particular land policy for centuries to come.

Unfortunately for the native people of the Pacific, Australia was not the only colony in which *terra nullius* governed as law of the land. On the West Coast of North America, *terra nullius* ruled in British Columbia and in California. In California, which was the only part of the United States formally treated as *terra nullius*, indigenous people did not farm, were weak military opponents, and lived in small groups with little intertribal organization.[11] When American settlers came en masse – years before the federal government arrived or even declared formal sovereignty – they expelled natives from their lands instead of contracting with them. Aside from noting that American settlers considered the Californian natives to be less advanced than their Eastern counterparts, Banner does not explain why the Californian settlers decided not to purchase lands privately as other settlers had done in other parts of North America.[12] In those other parts, settlers often had the ability to dominate indigenous peoples in battle, and government oversight was frequently weak or nonexistent. Was the military disparity simply that much greater in California? Were the settlers there particularly rapacious in a way that others were not?

The issue finally reached the United States Congress in the 1850s when the Senate received and considered reports from four expert surveyors concerning the land rights of California natives. Banner deftly illustrates both the ignorance of the supposed experts of the day and the Senate's disinterest in the entire subject by explaining the wildly disparate conclusions reached by each of the experts and the Senate's decision to ignore all four opinions. Ultimately, the Senate sent government commissioners to purchase native land in accordance with practices elsewhere.[13] The hopelessly ill-equipped commissioners only established treaties with sixty-seven of the roughly 250 tribes of California and made seventy-two treaties with villages, individual natives, and sometimes the same tribe multiple times.[14] In the end, the point was moot. In the latter part of the section, Banner explains how the politically active and disproportionately large settler community – many of whom had already staked claims throughout the reservations proposed by the com-

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[10] *Id.* at 44 (quoting Letter from George Grey to George Mercer (Apr. 14, 1826) *in* 1 HISTORICAL RECORDS OF AUSTRALIA 18:390).

[11] *Id.* at 168 (citing 2 JOHN COULTER, ADVENTURES ON THE WEST COAST OF SOUTH AMERICA, AND THE INTERIOR OF CALIFORNIA 136 (1847)).

[12] Banner notes, for example, that "many of the seventeenth-century settlers of North America purchased land from the Indians." BANNER, *supra* note 1, at 45.

[13] *See* Act of Sept. 28, 1850, ch. 82, 9 Stat. 519 (authorizing the appointment of Indian Agents in California).

[14] BANNER, *supra* note 1, at 182 (citing Robert F. Heizer, *Treaties*, *in* 8 HANDBOOK OF THE NORTH AMERICAN INDIANS: CALIFORNIA 701, 702-704 (1978)).

missioners – convinced the government to reject the treaties. Banner fails to account for the government's continued apathy throughout the 1850s and 1860s, but one can surmise that events back East garnered the lion's share of the country's attention. As in Australia, once the stage was set, there was little that proponents of change could do to uproot the system.

Just as California was the only part of the United States formally considered *terra nullius*, British Columbia was analogously the only province in Canada treated as such. In his analysis of British Columbian land policy, Banner criticizes the traditional explanations offered for it – settlers wanted land, they did not consider natives their equals, and the colony was too far from the Crown for effective control – as insufficient to explain this anomalous policy.[15] These conditions existed in almost every British colony, Banner argues, so unless historians can prove that settlers in British Columbia were unusually avaricious, some other explanation is needed. Banner argues that the earlier colonial administrators in this region, who were employees of the Hudson Bay Company rather than servants of the Crown, treated the natives' land as *terra nullius* out of "kindness."

Unlike some other colonial administrators, James Douglas, the Company's chief factor on Vancouver Island, had decades of experience working with the Indians of the Northwest. Douglas began the formal colonization of Vancouver Island by purchasing land, offering staggered payments in goods, and reserving portions of the land for the use of the indigenous Vancouverites. These early treaties suffered from the same defects that plagued land sales between colonists and indigenous peoples across the globe: the groups had different conceptions of the nature of the transaction, the colonial authorities placed extreme pressure to keep costs down, and the native groups struggled to quickly adapt to a new way of life. Most troubling for Douglas, however, was the issue of consent. Even assuming the native tribes understood the transaction, Douglas knew enough about indigenous political organization to recognize that native chiefs did not possess absolute ownership over the lands they governed and thus a truly consensual treaty would require the approval of most, or possibly all, tribe members.

Douglas, who was half black and had an Indian wife, cared more deeply than most about the welfare of the Vancouver natives – which in the nineteenth century meant that he wished to serve as a "friend and benefactor" of the natives and to help them "catch up" to the Anglo-Americans.[16] In particular, Douglas wished to settle the native tribes in villages, sell the

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[15] In particular, Banner criticizes ROBIN FISHER, CONTACT AND CONFLICT: INDIAN-EUROPEAN RELATIONS IN BRITISH COLUMBIA, 1774-1890, at 150-157 (1977); ROBERT E. CAIL, LAND, MEN AND THE LAW: THE DISPOSAL OF CROWN LANDS IN BRITISH COLUMBIA, 1871-1913, at 171-173 (1974); BARRY M. GOUGH, GUNBOAT FRONTIER: BRITISH MARITIME AUTHORITY AND NORTHWEST COAST INDIANS, 1864-90, at 70-72 (1984). *See* BANNER, *supra* note 1, at 355 n.2.

[16] For a biographical account of Douglas and his family, see JOHN ADAMS, OLD SQUARE-TOES AND HIS FAMILY: THE LIFE OF JAMES AND AMELIA DOUGLAS (2001), *cited in* BANNER, *supra* note 1, at 365 n.36.

remaining land, and invest the proceeds in the native villages in order to spur their development.[17] Douglas could not adopt this plan, however, if he continued to recognize Indian property rights in land. When Douglas left his post, however, his replacements continued his established policy of *terra nullius* but did not share his vision of white colonists and natives farming, fishing, and shopping side by side.[18] As in other colonies, however, once the policy of *terra nullius* was established, it continued for decades despite dissenting voices.

Unlike the preceding regions, Alaska was not officially treated as *terra nullius* – it was simply ignored. When the United States purchased Alaska in 1867, it expressly upheld the grants of land from Russia to Russian colonists and "creoles" but "effectively deferred" the question of native rights.[19] By 1867, government officials had come to two conclusions: 1) that the population of natives was declining and would only continue to do so and 2) that virtually all the previous attempts to set federal Indian policy had failed. In response, the government policy in Alaska was simply to do nothing: no treaties, no payments, no reservations, and no superintendents. For the first few decades, the small numbers of settlers and enormous size of the land kept the issue off of the federal government's radar. By the time Congress finally confronted the issue, most of Alaska's 36,000 white settlers had government-derived property rights such as mining claims or rights to cut timber. Faced with these investment-backed expectations, Congress compromised, recognizing native rights only in those lands that natives were actually occupying and according no rights to lands they were not using.[20]

Banner persuasively explains how the previous grants of land prevented Congress from recognizing full native title to all Alaskan lands. In explaining the Congressional decision, however, Banner overstates his case when he argues that Congress *could not* have chosen *terra nullius* because of a prior declaration that white settlers should not disturb Alaska natives in their ongoing uses of land. First, the governments of British Columbia and California formally settled on *terra nullius* after ostensibly recognizing native title by negotiating 14 and 139 contracts for land, respectively. Second, accounts of conversations between Tlingit chiefs and the Alaskan government in 1898 cited by Banner show that native peoples without a doubt believed that white settlers had disturbed their ongoing uses of land.[21] Banner fails to

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[17] BANNER, *supra* note 1, at 214 (citing Letter from Douglas to Lytton (Mar. 14, 1859), *in* PAPERS CONNECTED WITH THE INDIAN LAND QUESTION, 1850-1875, at 17, 17 (Ministry of Aboriginal Affairs ed., 1877)).

[18] In support of this account, Banner references Robin Fisher, *Joseph Trutch and Indian Land Policy*, 12 BC STUD. 3 (1971) and PAPERS CONNECTED WITH THE INDIAN LAND QUESTION, 1850-1875, *supra* note 17, at 42.

[19] BANNER, *supra* note 1, at 293.

[20] *See* Act of Mar. 3, 1891, ch. 561, 26 Stat. 1095, 1100.

[21] BANNER, *supra* note 1, at 375 n.1 (citing Ted. C. Hinkley ed., '*The Canoe Rocks — We Do Not Know What Will Become of Us': The Complete Transcript of a Meeting between Gov-*

explain why the nineteenth century Congress felt bound to respect its previous policy but did not feel bound to even attempt to enforce it.

The Congressional decision to recognize partial occupancy rights may have instead come about for the same reason Congress decided to defer the decision in 1867: it was the path of least political resistance. If Congress had formally established *terra nullius*, it would have taken on the responsibility of figuring out what lands it *should* grant to the Alaskan tribes in order to protect their rights and it would have had to extend that same unsuccessful apparatus of federal Indian policy to the Alaskan territory.[22] By choosing to "compromise,"[23] Congress ostensibly believed the Alaskan tribes could fend for themselves on the land they occupied. Regardless of the motivations for the decision, Banner notes that "by the turn of the century, in the parts of Alaska most attractive to whites, trespassing on native land was so common that *terra nullius* seems in practice to have been more the rule than the exception."[24] By and large, this policy would not change for several more decades.

II. Treaties and Contracts

The story of the Pacific is not purely the story of *terra nullius*. In the Pacific Northwest and New Zealand, for example, colonists acquired land primarily through treaty and contract. But why would settlers in New Zealand use contracts while those in Australia did not? Banner argues convincingly that the differing policies stemmed not from colonial policy but from two real-world differences. First, despite enormous differences in land practices between the two groups – unlike the British, the Mâori inherited or fought for land rather than purchased it, and they allocated property rights in a functional rather than solely geographical manner[25] – the British respected the "great deal of Cultivated land" and the neat rows and reed fences of the Mâori farmers.[26] Second, New Zealand was first explored by individual settlers, not government expeditions. These settlers did not have the military might to fend off attacks from Mâori tribesmen and found negotiation a simpler and safer means of establishing their farms. Banner's detailed account of these early land purchases illustrates a wide variation in colonial attitudes

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ernor John Green Brady of Alaska and a Group of Tlingit Chiefs, Juneau, December 14, 1898, 1 W. Hist. Q. 265, 270-277).

[22] *See* Banner, *supra* note 1, at 294 (discussing the Congressional and public disapproval of federal Indian policy and the expansion of that policy into Alaska).

[23] *Id.* at 305.

[24] *Id.* at 310.

[25] Banner explains that "a person would not own a zone of space; one would instead own the right to use a particular resource in a particular way. One might possess the right to trap birds in a certain tree, or the right to fish in a certain spot in the water, or the right to cultivate a certain plot of ground." *Id.* at 50.

[26] *Id*. at 331 n.1 (quoting 1 The Journals of Captain James Cook on his Voyages of Discovery 183, 188 (J.C. Beagehole ed., 1974) (1955)).

and understanding. Many colonists displayed a surprising knowledge of and sensitivity to the differences in land use practices between the Mâori and the British, while others speculatively purchased enormous tracts for pittances from individual Mâori who almost certainly did not own all the land they purported to sell.[27]

In order to placate settlers who had already purchased land and avoid war against a still formidable opponent, the nascent colonial government recognized Mâori property rights in the entirety of New Zealand. The colonial administrators assumed that the relatively advanced Mâori would have less use for uncultivated land than other indigenous peoples and would sell their vast tracts of uncultivated land cheaply and focus on their farms alongside white colonists. The government formed a land claims commission to determine which purchases were legitimate and which were speculative; all future purchases were routed through the government commission.

Banner analyzes the sales between the Mâori and the British (both settlers and government) with an economically-oriented approach that is unfortunately absent from many of his other accounts. On the one hand, the land sales allowed transfers between a group with enormous amounts of land but few other physical goods and another with technology and manufactured goods but no land.[28] On the other hand, the government's decision to route all purchases through the colonial administration – initially designed to "protect" the Mâori from swindlers and speculators – allowed the government monopoly to hold down prices of Mâori land and then resell those same plots to eager settlers for enormous profits. If the Mâori had the ability to negotiate with competing groups of settlers, Banner argues, the informational disparity between the parties would have disappeared as the settlers outbid each other in front of Mâori eyes.[29] Tellingly, the tribes of the more sparsely colonized North Island learned from their experiences and those of the South Island, and in the 1860s they banded together around a Mâori king to halt land sales.

Colonists in Oregon and Washington purchased land as well, but through the (ostensibly) unique means of compulsory treaties. The story of the Oregon territory began much like that of California: white settlers pressed the government to send treaty negotiators to Oregon but made their claims anyway; the Senate ultimately sent officials to negotiate but then rejected their treaties in 1852. The settlers of Oregon continued to stake claims and the native tribes fought back fiercely. Unlike in California, however, the small settler communities struggled against this native resistance and their territorial government could not grant title and instead relied on federal approval. Congress responded to the settlers' pleas and in 1854 ap-

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[27] *See id.* at 49-60, 64-65.
[28] *See id.* at 69.
[29] *See id.* at 76.

propriated $3,000 for treaties in Washington and Oregon.[30] By contrast, when the Senate rejected the California treaties, also in 1852, they never revisited the subject.

Although it would not be too great a stretch to describe almost all treaties between colonists and indigenous people as compelled, by the time colonists flooded into Oregon and encountered tribes decimated by disease and demoralized by stories of American treaties elsewhere, the practice of signing treaties had became almost farcical. When government negotiators returned to the Northwest in the late 1850s, they did not find many willing partners. Banner does not explain in detail the reasons for the tribes' reluctance to sign the treaties, but the previous treaty rejections, the small sums of money offered, and their knowledge of previous treaties signed by other tribes further east most likely contributed to their decision. Regardless, government officials refused to offer many concessions to the tribes, as they knew the colonists' military strength was growing and the Indians' strength was declining each year. "If you do not accept the terms offered and sign this paper," stated one government official evidently unconcerned with the elements of the common law defense of duress, "you will walk in blood knee deep."[31]

III. Indigenous Political Organization

Through the use of his case studies, Banner explains how the more highly organized indigenous peoples were, on the whole, better able to protect their interests from the advancing tides of colonists. In New Zealand, however, intentional changes in the legal regime thwarted their best efforts. As discussed above, the Mâori on the North Island were, by the 1860s, able to coalesce around a king opposed to any land sales to colonists. Not coincidentally, a movement by white colonial officials to individualize Mâori land titles finally came into fruition around the same time.

This movement, Banner explains, was not propagated solely by rapacious colonialists eager to gain access to more Mâori land (although that was undoubtedly one factor). Commentators of the era had long criticized the Mâori system, in which a number of title holders each had a unique possessory interest in a geographic area, as not conducive to large-scale farming or private investment and as likely responsible for the large amounts of uncultivated "waste" land on the islands. Individualizing title, they believed, would allow individual Mâori who wanted to convert their land assets into other assets to do so and thus improve their welfare.[32] On a political level,

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[30] *See* Act of July 31, 1854 ch. 167, 10 Stat. 315, 330, *cited in* Banner, *supra* note 1, at 367 n.37 (making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes).

[31] Banner, *supra* note 1, at 367 n.42 (quoting Ezra Meeker, Pioneer Reminiscences of Puget Sound 232-233 (1905)).

[32] *See id.* at 88-89.

proponents of land reform believed individualizing geographical titles would break down the Mâori political institutions and thus empower individual Mâori to participate as full members of the colonial state. Under British law, Banner notes, only those with freehold or leasehold land – and not merely use rights – could vote, and the British of that era considered individual land ownership so bound up with civic responsibility and political rights that they considered changing Mâori land titles a more feasible means of integration than changing voting requirements.[33]

Land use reform failed, Banner suggests, not due to conceptual flaws with the individualization of title but because of the structure of the new legal regime itself. Any individual could drag his entire tribe into land court and title holders who refused to participate risked losing everything. Even if the tribe collectively benefited from refusing to deal with the court, individual interests made title conversion inevitable. Another British legal regime of credit extension and debt collection assured that even the most resolute of tribes would eventually succumb.[34] Desperation and collective action problems caused land to flood the market and drove prices well below the fair value in a competitive marketplace.

Aside from these problems in the legal regime, the land court simply did not function well. The colonial administrators hired common law judges with virtually no knowledge of Mâori culture, politics, or law (despite the presence of numerous non-lawyers who knew the Mâori very well). The judges focused primarily on freeing land for individual sale and considered accuracy to be of secondary importance. The colonial officials set up land courts in British towns far from Mâori communities, refused to reopen closed cases even if the true owner of land could not bring the case at first or was unaware of the proceedings, and made the Mâori cover the entirety of the enormous fees necessary for surveying the land, operating the court, hiring lawyers, and providing food and shelter to the litigants. These costs, Banner explains, would often equal or surpass the (depressed) market value of the land itself.[35] In the end, the land reform did little more than break the Mâori resistance to British encroachment and leave most of its people landless and penniless. Land reform in New Zealand was conquest through laws.

After exhaustively detailing the failures of land reform in New Zealand, Banner surprises his readers by explaining that the first land tenure reform in the Pacific took place not in New Zealand but Hawaii and not at the behest of colonial officials but by the Hawaiian elite themselves. Commoners in Hawaii – including white settlers – could never own land in fee simple but

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[33] *See id.* at 93.

[34] APPENDIX TO THE JOURNALS OF THE HOUSE OF REPRESENTATIVES 1873, S.N.Z. G-7, 2.

[35] *See* BANNER, *supra* note 1, at 341 n.60 (quoting Letter from Te Wheoro to McLean (Apr. 8, 1871) *in* ARCHIVES NEW ZEALAND MA 13/2b (describing the expenses for the litigation process by stating, "Behold there is the survey one, the court two, the Lawyers three, the Native Interpreters four, the Crown Grant five and the giving of the land to the other side.").

merely held a form of leasehold revocable by the king. Eager to protect their assets, they understandably pleaded for reform. Perhaps surprisingly, the native Hawaiian elite ultimately agreed with them.

Banner describes the shift in Hawaiian land tenure, the Mâhele, as at base the result of an alliance between the Hawaiian elite and the settler community. The settlers pushed for land reform not only to protect their lands but also because they disapproved of the feudalistic Hawaiian elite and thought land reform would spur the development of a native middle class.[36] The Hawaiian elite themselves not surprisingly did not share these concerns, but as major landowners hoped to gain from increases in productivity and rising land value. More importantly, the Hawaiians feared foreign annexation and wanted to protect their titles. The king's American advisors, Banner explains, would have informed the king that the more the Hawaiian land system resembled that of the Americans or the British, the more likely those foreign powers would be to recognize full title rather than merely use and occupancy.

According to Banner, land reform in Hawaii proceeded more smoothly than that in New Zealand. As expected, the process had an elitist tilt – most of the illiterate and relatively uninformed maka'âinana (commoners) did not file claims and received no extensions, while the chiefs did file claims and those that did not received filing extensions that lasted several decades. When the Americans finally annexed Hawaii, they respected all titles except the lands of the monarch, which, due to post-Mâhele court decisions and legislative actions resembled public land more than private land.[37] Aside from this interesting exception, however, the Mâhele, like the New Zealand land tenure reform, worked for those that controlled the process, the white settlers and Hawaiian elite, and left behind those that did not.[38]

In his final section on indigenous political organization, Banner contrasts the islands of Fiji and Tonga. Both societies were agricultural and first encountered colonists as part of a trickle of private individuals rather than a government-led initiative. Political authority in Tonga was centralized, however, while authority in Fiji was split among a number of tribes. Thus while the centralizing Tongan authorities, like the centralized British authorities in New Zealand, were able to dictate the terms of trade and allowed only leaseholds, certain Fijian kings sold land in fee simple. As in other colonies, fee simple opened the way for more settlers, and by 1870 much of the agricultural land in Fiji was in colonial hands.

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[36] *Id.* at 345 n.35 (quoting Letter from David Malo to William Richards (June 2, 1846) *in* F.O. & Ex. at ser. 402, box 17, file 386, HSA ("There must grow up a middle class, who shall be farmers, tillers of the soil, or there is no salvation for this nation")).

[37] *See In re* Estate of His Majesty Kamehameha IV, 2 Haw. 715 (1864); *see also* Jean Hobbes, Hawaii: A Pageant of the Soil 68-69 (quoting the text of a statute passed by the Hawaii legislature), *cited in* Banner, *supra* note 1, at 347 nn.51-52.

[38] By comparison, Banner's appraisal of the Mâhele is more positive than the opinions of other leading scholars. *See, e.g.,* Lilikala Kame'eleihiwa, Native Land and Foreign Desires: Pehea LA E Pono Ai? (1992).

Banner's analysis of the two islands overlooks a few key points. First, Banner underemphasizes the role of geography. Perhaps the fact that Fiji is twenty times larger than Tonga allowed it to attract the critical mass of settlers necessary both to establish a settler community capable of exerting significant political pressure and to produce enough surplus agriculture to attract the attention of world markets. Banner also fails to explain how, in the absence of the coercion present in New Zealand and the Pacific Northwest, the decision to sell land by certain Fijian chiefs weakened the ability of other chiefs to refuse to sell any land. Perhaps opening the door for alienation of land de facto opened the door for at least some coercion and manipulation – colonists who originally obtained leaseholds could argue in court that they purchased land outright. Finally, even in his sections highlighting indigenous organization, one can readily see the enormous influence colonial leaders held over even the most organized native societies. Banner explains, for example, how Sir Arthur Gordon's decisions recognized Fijians as owners of almost all unalienated land, held that any land currently possessed by Fijians was unalienable, and rejected almost two-thirds of the colonists' claims arising from already completed transactions. Under the rule of a different colonial leader, modern Fiji would undoubtedly be a very different place today.

IV. Conclusion

Overall, Professor Banner's exhaustively researched book does an excellent job of giving a balanced assessment of the policies and practices behind the colonization of land in the Pacific. The reader comes away with the impression that in almost every region in the Pacific, excepting perhaps Fiji and Tonga, most or all of the indigenous peoples suffered injustices at the hands of settlers and colonial governments. At the same time, Banner expertly proves through the use of primary sources such as letters, diaries, newspaper clippings, and colonial statutes that colonization in these disparate regions did not advance in a uniform fashion, stem from a cohesive strategy, or even rest on a single conception of native property rights. Banner contrasts, for example, the callous racism of some early setters – one Oregonian described the Indians there as "a sort of half human, half vegetable race"[39] – with the more balanced and even glowing accounts of others to show that the colonists did not share a fixed view of the natives they encountered. Banner does show, however, that colonists generally held some groups, such as those that had advanced agricultural practices, in higher esteem and tended to afford them greater property rights.

Banner convincingly proves many of his proposed explanations for the differences in colonial policies. Banner's analysis certainly supports the hy-

[39] Banner, *supra* note 1, at 232 (citing P. J. Edwards, Sketch of the Oregon Territory; or, Emigrant's Guide 6 (1842)).

pothesis that colonists accorded greater respect, and greater property rights, to indigenous groups with advanced agricultural practices such as the Hawaiians and Mâori. Banner's arguments also detail how the investment-backed expectations of the settlers often propagated a particular property rights regime established decades earlier by perhaps a single colonial official. Colonists in Australia and California pushed their governments to recognize *terra nullius* because they had never purchased their farms, while colonists in New Zealand pressured the Crown to recognize the Mâori as landowners in order to cement the legitimacy of their past purchases.

Banner may have stretched other explanations too far, however. Banner persuasively explains how governmental authorities, such as the American government in Hawaii, were more likely to recognize native title when native holdings aligned with the common law. When comparing the decisions of early settlers to purchase as opposed to take land, however, cynical readers cannot help but to surmise that relative military strength played an even larger role than Banner admits. In his section on Australia, for example, Banner suggests that "had the British known more about the Aborigines from the start, they might have recognized Aboriginal property rights."[40] American settlers traveling to California and Alaska during the second half of the nineteenth century, however, refused to recognize native land rights despite centuries of experience with indigenous tribes in other parts of the country. With the same information, would British convicts in Australia have made different choices than American forty-niners?

Similarly, Banner notes that New Zealand was settled not by a government expedition but by individual settlers without the might to seize land from the Mâori. When describing the development of relations between the nascent settler community and the Mâori, however, Banner deemphasizes military strength and instead provides a rich description of the differences between British conceptions of property and Mâori ones. One wonders, however, if the majority of settlers knew of or even cared about these distinctions;[41] perhaps they decided to purchase not out of respect for Mâori agriculture or to conform with the practices of other settlers, but merely because the Mâori were formidable military foes for even large groups of settlers. Even as late as the 1860s, Mâori uprisings over the rigged contract system imposed huge costs on the colonial government and the increasingly large settler community and required over ten thousand Imperial troops to quell.[42] An earlier war by a relatively larger group of Mâori against a

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[40] *See id.* at 46.

[41] In another article, Banner himself minimizes these sort of distinctions. He notes that "[f]or all their love of the land, many indigenous people in many places proved quite eager to sell it, to obtain all the useful manufactured goods that would have been otherwise unattainable. Europeans and their descendants, meanwhile, were hardly slow to develop romantic attachments to their land." Stuart Banner, *Transitions Between Property Regimes*, 31 J. LEGAL STUD. 359, 370 (2002).

[42] *See* Aditya Basrur, *The Conception and Birth of the Stamp Duties Act 1866*, 14 N.Z. J. TAX'N L. & POL'Y 45, 49-50 (2008).

smaller group of settlers over a policy of *terra nullius* may have led to a different outcome.

Finally, while Banner offers explanations for most of the discrepancies in colonial outcomes, some questions remain unanswered. Why did colonists in Fiji acquiesce relatively easily to Sir Arthur Gordon's sweeping decisions while settlers in the Pacific Northwest pushed back against and ultimately ignored James Douglas's policy of allotting large reservations to Indian tribes and allowing Indians to purchase land on the same terms as whites? For that matter, what difference in circumstance lay behind the scrupulous court in Fiji and the kangaroo court in New Zealand?

By and large, Banner's explanation for the differences in colonial policy are thoughtful and well-supported. Ultimately, however, Banner's readers must still ask themselves whether this new book did in fact challenge or even deepen the "simple understanding" described in the first sentence of this note. Banner certainly leaves his readers with the impression that the colonization of each area of the Pacific occurred under different formal legal regimes, with differing levels of native resistance, and under colonial administrations with greater or lesser amounts of interest in the welfare of native peoples. At the same time, his book struggles to answer the fundamental questions that naturally flow from these detailed historical accounts: at the end of the day, did any of these differences matter? Did these variations represent anything other than various detours on the path of inevitable conquest?

The real drawback of Professor Banner's book is his merely passing analysis of how these variations in colonial treatment have affected the struggles for legal and material equality of indigenous peoples in the past century. In his introduction and his conclusion, Banner claims that differences in colonial law have come to matter a great deal to modern claims for redress because courts tend to evaluate the claims by the law in place during the misappropriation and the strength of these legal claims often determines the attractiveness of a given political settlement.[43] Those well-versed in the legal history of each of the eight regions and aware of the land ownership rates and economic status of each of the indigenous groups studied could easily test Banner's second hypothesis. Less expert readers, however, would have been well served by an additional chapter tying the eight regions together and looking forward to future political settlements and legal decisions.

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[43] Not all courts take this approach, however. In 1992, the High Court of Australia finally rejected the doctrine of *terra nullius* centuries after its establishment and held that the Meriam people of the Murray islands did not have all their rights to the land extinguished by the annexation of the islands in 1879. Mabo v. Queensland II (1992) 175 C.L.R. 1. For a discussion of this decision and its impacts, see M. A. Stephenson & Suri Ratnapala, Mabo: A Judicial Revolution: The Aboriginal Land Rights Decision and its Impact on Australian Law (1993).

Banner's research provides a historical compilation that not only allows us to draw meaningful conclusions from the disparate circumstances across the Pacific, but could also serve as an strong foundation for future inquiry into an area ripe for research. In a recent article, one scholar of native Hawaiian property rights juxtaposed historical events such as the Mâhele with recent court decisions and suggested that "aloha jurisprudence" has crept into Hawaiian property law decisions.[44] Other scholars could apply the same analysis to other Pacific regions to see if the Hawaiian example is an anomaly or the beginning of a trend. Perhaps a more quantitatively oriented scholar could attempt to measure the impact of the differing historical policies on the indigenous peoples of the Pacific today by undertaking a comparative analysis of relative rates of land ownership, poverty, and education among each group (and its non-native neighbors). Other researchers could focus on the few remaining Pacific communities, such as those in Tonga and certain parts of Micronesia, where the indigenous land tenure systems remain virtually unchanged, and consider whether these systems have advanced or stalled the economic and social development of these communities.

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[44] *See* Alfred Brophy, *Aloha Jurisprudence: Equity Rules in Property*, 85 OR. L. REV. 771 (2006).

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